Testimony of Linda J. Morgan
Chairman of the Surface Transportation Board

Senate Committee on Commerce, Science, and Transportation
Subcommittee on Surface Transportation and Merchant Marine
Hearing on
the Surface Transportation Board
March 21, 2001

Introduction

My name is Linda J. Morgan, and I am Chairman of the Surface Transportation Board (Board). I am appearing today at the Subcommittee's request to provide an overview of the Board's activities since its inception, with a particular focus on actions taken by the Board on various rail transportation issues. The Subcommittee also has asked for information regarding the Board's budget, as well as the Board's proceeding to reexamine its major rail merger policy and rules.

I have testified numerous times before Congress since the creation of the Board. My testimony here attempts to capture the essence of the prior testimony and provide an update on Board activities since my Congressional appearances last year.

Overview of the Board

The Board came into being on January 1, 1996, in accordance with the ICC Termination Act of 1995 (ICCTA). Consistent with the trend at that time toward less economic regulation of the surface transportation industry, the ICCTA eliminated the Interstate Commerce Commission (ICC) and, with it, certain regulatory functions that it had administered. The ICCTA transferred to the Board core rail adjudicative functions and certain non-rail adjudicative functions previously performed by the ICC. Motor carrier licensing and certain other motor functions

were transferred to the Federal Highway Administration within the Department of Transportation (DOT). And Congress provided the Board with more limited resources.

The Board is a three-member, bipartisan, decisionally independent adjudicatory body organizationally housed within DOT. The rail oversight conducted by the Board encompasses, among other things, maximum rate reasonableness, car service and interchange, mergers and line acquisitions, line constructions and abandonments, and labor protection and arbitration matters. The jurisdiction of the Board also includes limited oversight of the intercity bus industry and pipeline carriers; rate regulation involving noncontiguous domestic water transportation, household goods carriers, and collectively determined motor rates; and the disposition of motor carrier undercharge claims. The substantial deregulation effected in the Staggers Rail Act of 1980 (Staggers Act) and the laws governing motor carriers of property and passengers was continued under the ICCTA. The ICCTA empowers the Board, through its exemption authority, to promote deregulation through administrative action.

The period after the passage of the ICCTA presented many logistical challenges. Fewer than half of the personnel who had worked for the ICC were retained by the Board. Yet, the case load remained heavy, and indeed increased in complexity and degree of challenge, particularly with the significant restructuring taking place in the rail industry and the focus of parties on testing the law in certain areas. The Board had to find ways to do more with less.

We hit the ground running, and quickly became what I believe to be a model Federal agency. We were given many rulemaking deadlines in the ICCTA, and we met each and every one of them. We revamped the old ICC regulations to reflect the new law; we streamlined the regulations that remained relevant to make them work better; and we issued new regulations so that we could move cases to resolution more quickly. We have continued to meet our deadlines

and to look for ways to handle matters more efficiently. And we have moved cases faster, and as a result have made great strides in clearing up the older docket.

Many of the cases that we have tackled at the Board -- some of which had been pending at the ICC for many years, and some of which have been new -- have been extremely difficult and controversial. But a principal focus of the Board's work is the belief that parties who bring disputes to the Board want and should have the certainty of resolution and that the Board is here to make decisions in hard cases. Not everyone will like every decision we issue, but our job is to take the controversies that come our way, review the records carefully, and then put out decisions as expeditiously as possible that implement the law to the best of our ability. The competence of our staff and the integrity of our decisionmaking process are reflected in our record of success in court: since I became Chairman (at that time of the ICC) on March 24, 1995, several hundred ICC and Board cases have been decided, about 170 cases have been challenged in court, and well over 90% of those cases have been upheld. Fair and expeditious case resolution and the certainty and stability that come from success on appeal should be key objectives for an adjudicative body such as the Board.

The Board's Resources

When the Board was created, it was authorized for 3 years, through September 30, 1998. Because of the controversy surrounding the law that the Board implements, the agency has not been reauthorized. However, it continues to be funded on an annual basis, operating at essentially the same resource level since its establishment in 1996.

Current Fiscal Year. The Board's current appropriation for fiscal year (FY) 2001 provides $17.916 million for 143 staff-years. (This resource level is the result of an across-the-board rescission of $38,000 from the amount originally enacted.). The appropriation provides that up to $900,000 in user fee collections may be credited to the $17.916 million appropriation, thereby allowing the Board's resources to be derived from both funding sources. This credit provision also means, in essence, that our funding this year is guaranteed regardless of the level of user fees actually collected.

The Budget for the Next Fiscal Year. In the Board's FY 2002 budget, we requested $18.889 million and 145 staff-years. The President's budget provides for $18.457 million and 143 staff-years, which is only a slight decrease from our request and essentially represents a status quo budget allowing for relatively constant staffing and funding levels. The FY 2002 budget also includes $950,000 in user fee collections offsetting the $18.457 million request under the same appropriation crediting provisions contained in the FY 2001 Transportation Appropriations Act. This provision means in essence that our funding would also be guaranteed in FY 2002.

User Fees. Congress continues to expect that some of the Board's funds will come from user fees. Significantly, however, the FY 2002 budget is the first one in which the Administration has not requested full funding by user fees for the Board. And recently Congress through the user fee credit provision has guaranteed the Board's funding level up front.

In this regard, particular concern has been raised about the level of user fees associated with the filing of rail rate complaints. In light of this continuing concern, the Board has held down the user fee levels for these cases for the last 2 years to 20% of the full cost of processing

one of them, even though a DOT Inspector General report urged the Board to assess fees that more closely adhere to full costs.

The Board regularly revisits its user fee schedule. Further, we have fee waiver procedures in place to ensure that parties seeking adjudication of matters under our jurisdiction are not precluded access to the Board because of the level of user fees.

Workload. The Board continues to accomplish much with limited resources. Although there have been some shifts among workload categories, the Board projects a relatively level overall workload through FY 2002. For example, while we have resolved all of the cases in the motor carrier undercharge docket, there has been a significant increase in rail rate case filings, as well as rail restructuring activity in FY 2001. We project that this trend will continue through FY 2002.

Future Needs. In connection with future Board resource needs, I should note two issues. First, the Board must continue to focus on hiring new employees in sufficient time to be prepared to replace the many experienced employees that will be retiring in the next few years. Second, the Board must have the resources necessary to accommodate any legislative changes that Congress might approve.

The Board's Overall Approach to its Responsibilities

I believe that the Board has been a model of "common sense government," looking "outside of the box" for creative solutions to the serious regulatory issues entrusted to it, and promoting private-sector initiative and resolution where appropriate while undertaking vigilant government oversight and action in accordance with the law where necessary to address imperfections in the marketplace. In many circumstances, private-sector initiative can provide

for better solutions because it can be tailored to the needs of the individual parties, can go beyond what government is able to do under the law and with its resources, and can create a dynamic in which all the parties to the initiative have been involved in its development and thus are invested in its success. And government can use its presence and its processes to encourage such results and bring parties together in new and constructive ways. At the same time, there are circumstances in which more direct government action is necessary, and in such situations, the Board has used its authority appropriately, creatively, and to the fullest extent in accordance with the law.

The work of the Board has exemplified the balance of private-sector and government action. This balance, for example, was demonstrated in the Board's handling of the rail crisis in the West. In that matter, under the umbrella of an unprecedented 9-month emergency service order, the Board required significant operational reporting, engaged in substantial service monitoring, and redirected operations in a focused and constructive way. The Board was successful in working on an informal basis with affected shippers to resolve service problems, and it was careful not to take actions that might have helped some shippers or regions but inadvertently hurt others. And the Board proceeded in such a way as not to undermine, but rather to encourage, important private-sector initiatives that facilitated and were integral to service recovery, such as the unprecedented creation of the joint dispatching center near Houston, TX, and the significant upgrading of infrastructure.

In addition, responding to the concerns of Members of this Committee, and in particular Chairman McCain and Senator Hutchison, we held extensive hearings on access and competition in the railroad industry, which resulted in a broad mix of private-sector and government initiatives, summarized in my attached letter to Senators McCain and Hutchison dated December

21, 1998 (December 21 letter). Those initiatives included the revision of the "market dominance" rules to eliminate "product and geographic competition" as considerations in rate cases and the adoption of formal rules providing for shipper access to a new carrier during periods of poor service. They also included the formal railroad/shipper customer service "outreach" forums, which produced the public dissemination for the first time ever of carrier-specific operational performance data by the major railroads, based on the data collection that the Board had initiated during its handling of the service crisis in the West and continued in its monitoring of the acquisition of Conrail by CSX and Norfolk Southern (NS). And the initiatives included the unprecedented formal agreement between large and small railroads addressing certain access issues of concern to the smaller carriers and to various members of the shipping public, the implementation of which the Board continues to closely monitor.

My letter to Congress also highlighted areas in which the Board believed legislation would be required if Congress wanted to fully address certain concerns that had been raised. These areas included small shipper rate relief, certain labor matters, and more open access that, unlike the current law, would not require a threshold showing that the serving carrier acted in an anticompetitive way. Regarding open access, the Board did direct interested parties as part of this rail access and competition proceeding to meet to see if common ground could be found. Those discussions were not successful.

The balance of private-sector and government action is also exemplified by the Board's informal dispute resolution process that it used during the service crisis in the West and more recently in addressing service problems that have arisen from the implementation of the Conrail acquisition. And this process has now been formalized through the establishment of the Rail Consumer Assistance Program, discussed later on, and enhanced through monitoring by the

Board of the various customer service programs at the various Class I railroads. Also, the Board has been active in focusing the Class I railroads on improving the operations of the Chicago terminal, a major gateway between the East and the West.

At the same time, the Board has promoted purely private-sector dispute resolution. It imposed as a condition to its approval of the Conrail acquisition the establishment of a privately agreed-to Conrail Transaction Council made up of shipper and carrier representatives for the purpose of discussing implementation problems. With the encouragement of the Board, the National Grain and Feed Association and the Association of American Railroads (AAR) and the National Mining Association and the AAR reached groundbreaking agreements on issues of concern to their respective memberships that provide dispute resolution procedures that are more tailored to the interests of the individual parties. These agreements will hopefully provide a model for other such carrier/customer agreements. Furthermore, the Board has attempted to move in the direction of private negotiation rather than government fiat as the way of resolving employee matters, a trend which I discuss later in my testimony.

In individual cases brought to it, the Board has used its authority fully and creatively. For example, in a case in which Amtrak sought to carry certain types of non-passenger traffic, we interpreted the statute in such a way as to bring about a private agreement between Amtrak and individual freight railroads on the matter after the Board's decision was rendered. In railroad consolidation and construction proceedings, our process has encouraged private-sector solutions with respect to environmental and other issues, but where the private parties have been unable to reach resolution, the Board has imposed conditions to remedy the concerns expressed in a way that preserves the benefits of the transaction under consideration. And with respect to the "bottleneck" rate complaint cases (involving rates for a segment of a through movement that is

served by a single carrier), while shipper parties argued that the Board should have gone farther in its rate review, the Board's decisions do provide for rate relief where there is a contract for the non-bottleneck segment, based on a pragmatic reading of the statute that was affirmed in court upon challenge by both the railroads and the shippers.

The Board has tackled many difficult issues effectively by balancing private-sector resolution and governmental action. This approach has ensured that, in the spirit of the ICCTA, available resources are put to the best use and government does not interfere inappropriately.

Rail Rate and Service Issues

Since I became Chairman of the ICC and then of the Board, the agency has tackled several important rail rate and service matters, and in this regard I believe that we have been responsive to shipper and other concerns in accordance with the law. In particular, we have been committed to resolving formal and informal shipper complaints expeditiously, clarifying applicable standards for resolution of formal complaints, and leveling the playing field to ensure that the formal process is not used simply to delay final resolution and that it encourages private-sector resolution where possible. I believe that our record reflects those objectives.

Rail Rate Matters. The Board has jurisdiction to adjudicate complaints challenging the reasonableness of a railroad's common carriage rates only if the railroad has market dominance over the traffic involved. Market dominance refers to "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." Under the law, the Board cannot find that a carrier has market dominance over a movement if the rate charged results in a revenue-to-variable cost percentage that is less than 180%. If this ratio is over 180%, then the Board determines whether there is effective competition (historically, by

considering whether there was effective intramodal, intermodal, geographic or product competition, but more recently, since the Board eliminated product and geographic competition as considerations in market dominance cases, by considering only intramodal or intermodal competition). If there is no effective competition, then there is market dominance. Thus, in considering any rate reasonableness challenge, the first finding that the Board makes is whether the carrier has market dominance over the traffic involved.

To assess whether rates are reasonable, the Board uses a concept known as "constrained market pricing" (CMP) whenever possible. CMP principles limit a carrier's rates to levels necessary for an efficient carrier to make a reasonable profit. CMP principles recognize that, in order to earn adequate revenues, railroads need the flexibility to price their services differentially by charging rates that reflect higher mark-ups over variable costs on captive traffic, but the CMP guidelines impose constraints on a railroad's ability to price differentially.

The most commonly used CMP constraint is the "stand-alone cost" (SAC) test. Under the SAC test, a railroad may not charge a shipper more than it would cost to build and operate efficiently a hypothetical new railroad, tailored to serve a selected traffic group that includes the complainant's traffic. The Board typically uses this test to resolve the large rail rate complaints that are presented to it.

With respect to rate cases, the Board has established deadlines and procedures to expedite the decisional process, and decisions resolving large rail rate complaints have refined the standards for developing the record in these cases. We have resolved the old cases (such as the "McCarty Farms" case that was pending at the ICC for some years) and — although we have recently been flooded with new rate cases that could tax our resources — we have kept up with

our statutory deadlines in putting out decisions in the newer cases that have been filed. We have sought to improve the rate review process by, for example, eliminating the product and geographic competition elements from the market dominance rules and by establishing evidentiary procedures (including a decision issued just recently) to allow us to process large rate cases more efficiently. The reviewing court has told us to take another look at the product and geographic competition case after it was challenged by the railroads, but in that case and in other respects, we will continue to try to find ways to make the process work better.

From a substantive perspective, the CMP procedure for determining whether a rate is reasonable or not is now a well accepted way of measuring rate reasonableness for larger rate cases, and of the 4 large rail rate cases that have been decided by the Board, the shippers have won in 3, while the defendant railroad won 1. Our "bottleneck" decisions, which construed the statute as permitting challenges to bottleneck rates (rates for a segment of a through movement that is served by a single carrier) when the shipper has a contract over the non-bottleneck segment, were, as noted, affirmed by two courts after they were challenged by both shippers and railroads. A number of shippers have taken advantage of the opportunity afforded by the bottleneck decisions and have filed "bottleneck" rate complaints with the agency. Consistent with the Board's philosophy favoring private sector resolution, several rate cases have been settled before the agency reached a decision.

The Board at the end of 1996 adopted simplified rules for small rail rate cases. However, no such cases have been brought to date under those rules. Concerns remain that those rules are still too complex. In my December 21 letter, I explained that the Board's rules reflect the statute and the standards that must be balanced, but I also recommended that Congress consider adopting a single benchmark test or some other simplified procedure for small rate cases to

address those process concerns. I am prepared to continue to work with Congress on this matter.

Service Issues. Over the past few years, we have used our general oversight and specific legal authority, as well as reporting and specific merger-related monitoring, to promote service improvements and resolve service problems. As I discussed previously, the Board applied its formal emergency service order and informal powers judiciously in dealing with the rail service crisis in the West. In addition, we adopted rules that permit a shipper to obtain the services of an alternative railroad when service is poor. Those rules require prior consultation among all of the involved parties to ascertain whether the problem can be readily fixed by the "incumbent" carrier, and, if not, to make sure that the proposed service will solve the problem without creating new problems. Board representatives are continually in communication with carrier management about general service issues, and they work on an ongoing basis with carriers and shippers to address individual service problems on an informal basis.

More recently, in connection with the Conrail acquisition in the East, we have engaged in extensive pre- and post-implementation monitoring, including the review of significant operational metrics and plans, and have continued to work constructively with carriers and with shippers to resolve service problems. And the Board in November of last year formalized its informal dispute resolution process by establishing a Rail Consumer Assistance Program through which individuals with rail-related problems can contact the Board's Office of Compliance and Enforcement by way of a toll-free number, an e-mail address, or a web site page. I believe that the Board has effectively addressed and can continue to address service issues.

Rail Mergers and Competition

Background on Past Rail Mergers. One of the areas in which the Board has issued some

high-profile decisions involves major rail mergers. Although mergers and other changes in corporate structure have been going on in the rail industry for many years, there has been substantial rail merger activity since the Staggers Act was passed, reflecting what has been occurring throughout the Nation's economy.

On the basis of the governing statute, under my Chairmanship of the ICC and the Board, four Class I rail mergers have been approved, with substantial Board-imposed competitive and other conditions. During this period, the Board evolved in a creative and constructive way in applying its conditioning authority, also incorporating private-sector agreements into the process. The conditions in a variety of ways provided for significant post-merger oversight and monitoring that have permitted us to stay on top of both competitive and operational issues that might arise. They provided for the protection of employees and the mitigation of environmental impacts, and our recent decisions employed a "safety integration plan" that draws on the resources of the Board, the Federal Railroad Administration, and the involved carriers and employees. And all of our decisions have assured that no shipper's service options were reduced to one-carrier service as a result of a merger.

In varying degrees, these mergers have had the support of segments of the shipping public, as well as employees and various localities, and were considered by a number of interested parties to be in the public interest. A variety of shippers actively supported the Burlington Northern/Santa Fe (BN/SF) merger, the inherently procompetitive Conrail acquisition, and the Canadian National/Illinois Central (CN/IC) merger. The Union Pacific/Southern Pacific (UP/SP) merger was opposed by some segments of the shipping community, although it was supported by others. However, the Board believed it was necessary,

not only to aid the failing SP, but also to permit the development of a second rail system in the West with enough presence to compete with the newly merged BN/SF.

Some have said that rail mergers are inherently anticompetitive, that they cause service problems, and that we should be discouraging them. In approving these mergers, the Board (and the ICC before that) considered the statutory criteria and concluded that, with all the conditions imposed, they would not diminish competition and in fact could enhance competition; would produce significant transportation benefits; and were otherwise in the public interest. The Board will continue to exercise its oversight authority in accordance with these objectives.

In this regard, in connection with the UP/SP merger, the Board has issued four general oversight decisions and one related to service in Houston (in addition to its actions with regard to the service crisis in the West); it has issued one oversight decision concerning the CN/IC merger; and in connection with the Conrail acquisition proceeding, it has issued one general oversight decision and two decisions regarding Buffalo, one on rates and the other on infrastructure, in addition to the ongoing operational monitoring of the Conrail acquisition.

New Major Rail Merger Policy and Rules. These recent mergers have changed the way the rail system now looks. In 1976, there were, by our calculations, 30 independent "Class I" (larger railroad) systems; nine of those systems have since then dropped down to Class II or III (smaller railroad) status because the revenue thresholds for Class I status were raised substantially some years ago; two large carriers went into bankruptcy; and the remaining 19 systems have been reduced to 6 large independent North American systems in the past 23 years (Kansas City Southern remains a smaller independent Class I system). In the United States, these include two competitively balanced systems in the West and two competitively balanced

systems in the East.

Given the changes in the make-up of the rail system in the past several years and developments associated with the most recent round of mergers, when the BNSF and CN rail systems announced their intention to merge in late 1999, the Board, after four days of hearings, issued a 15-month "moratorium" directing large railroads not to pursue further merger activities until the Board has adopted new rules governing large rail merger proceedings. The Board noted that recent merger implementation had not typically gone smoothly, and that the railroad industry and the shipping public had not fully recovered from the service disruptions associated with the previous round of mergers when the BNSF/CN announcement was made. Additionally, the testimony at the hearing confirmed the Board's perception that a BNSF/CN combination would more than likely instigate, in the very near future, responsive mergers involving each of the other four large systems. Therefore, the Board, like numerous parties that testified before it during its hearing, concluded that it needed to revisit its merger rules for large rail mergers in light of the current transportation environment and the prospect of a North American transportation system composed of as few as two transcontinental railroads. I appeared before this Committee a year ago to discuss the moratorium and the merger policy rulemaking.

In instituting its rulemaking to revise the rules for considering large rail mergers, the Board noted the increased concentration in the rail industry, along with the only limited opportunities remaining for significant merger-related efficiency gains. It concluded that the time has come to consider whether the rail merger policy should be revised, as many have suggested, with an eye towards more affirmatively enhancing, rather than simply preserving, competition and ensuring that the benefits of a future merger proposal truly outweigh any potential harm. More specifically, the Board is reexamining its approach to competitive issues;

"downstream" effects; the important role of smaller railroads in the rail network; service performance issues; how benefits should be examined and accounted for; how alternatives to merger, such as alliances, should be viewed; employee issues such as the override of collective bargaining agreements (CBAs); and international trade and foreign control issues that would be raised by any proposal of a Canadian railroad to combine with any large U.S. railroad.

The Board issued an Advance Notice of Proposed Rulemaking (ANPR) in March 2000 instituting its rulemaking to revise its rules for large rail mergers. Following the receipt of public comments on the ANPR and replies to the comments, the Board issued a Notice of Proposed Rulemaking (NPR) in October 2000, proposing new rules for major rail mergers. Over 100 parties are involved in the proceeding, and the Board has given the public the opportunity to file three rounds of comments (initial comments, replies, and rebuttals) on the proposed rules. In addition, the Board has scheduled an oral argument for April 5, 2001, and will hear from over 30 parties. The Board intends to issue its final rules by June 11, 2001, at which time the moratorium is scheduled to expire.

In its NPR, the Board has proposed a new policy statement and rules for future major rail mergers that raise the bar for approval. I have attached a copy of the press release describing the proposed policy and rules. The proposed new rules would require applicants to bear a substantially heavier burden in demonstrating that a merger proposal is in the public interest. Key provisions in the proposed rules would require applicants to affirmatively show that the transaction would enhance competition and improve service. They would require more accountability for benefits that are claimed and a showing that such benefits could not be realized by means other than a merger. And they would require more details up front regarding the service that would be provided, as well as contingency planning and problem resolution in

the event of service failures.

Rail Employee Issues

Background. Under the law, the Board becomes involved in rail employee issues as a result of its approval of various types of rail transactions. Certain significant employee issues are raised by Class I consolidations. When larger railroads consolidate, the individual CBAs and protective arrangements into which the merging railroads earlier entered are not always compatible.

The law that the Board administers provides for imposition of the so-called New York Dock conditions upon such transactions. The New York Dock conditions have their origins in the negotiated Washington Job Protection Agreement of 1936 (WJPA), which sets up the framework within which consolidations are to be carried out. New York Dock provides (1) substantive benefits for adversely affected employees (including moving and retraining allowances, and up to 6 years of wage protections for employees dismissed or displaced as a result of the consolidation), and (2) procedures under which carriers and employees are to bargain to effectuate changes to their CBAs if necessary to carry out the transaction, with resort to arbitration and, as a last resort, limited Board review if bargaining is not successful.

When the parties go to arbitration, the arbitrator must make a determination in all areas of disagreement, including the extent, if any, to which it is necessary to override a particular CBA where a change in a CBA is being proposed. In 1991, the Supreme Court confirmed that the law provides that agency approval of a consolidation overrides all other laws, including the carrier's obligations under a CBA, to the extent necessary to permit implementation of the approved transaction.

Employee interests have argued that the override of CBAs is purely an administrative remedy that the Board could administratively reverse, and that the Board in its consideration of appeals from arbitral decisions has too broadly construed when a CBA may be overridden. The override of a CBA, however, cannot be viewed as simply an administrative remedy that the Board could administratively reverse. The 1991 Supreme Court decision (often referred to as the "Dispatchers" case, rendered before I arrived at the ICC) and other court decisions have made that clear. The Supreme Court found that, once the consolidation is approved and the labor protection requirements are met, the law ensures that obligations imposed by contracts such as CBAs, or by other laws such as the Railway Labor Act, "will not prevent the efficiencies of consolidation from being achieved."

In short, given its view of the statutory scheme, the Supreme Court did not simply hold that the ICC had the "discretion" to decide whether to find that CBAs could ever be overridden, but rather stated that CBAs are to be overridden, when necessary to do so, because that is what the law and Congressional intent require. Case law since then has clarified the conditions under which CBAs can be overridden. Thus, short of an agreement between labor and management, a change in the law would be required to alter this overall approach and to prevent any override of a CBA. Accordingly, in my December 21 letter, I suggested that Congress consider addressing these issues through legislation if it is concerned about CBA overrides.

Agency Approach. The Board over the last few years has attempted to make the playing field more level in this entire area to promote more private-sector resolution. The Board has worked to move away from taking affirmative actions to break CBAs, has taken action to limit overrides in the decisions that it has rendered, and has encouraged private negotiation as a

preferred way of resolving related issues. The Board's specific emphasis on negotiation as the preferred way of resolving labor implementation matters has led to an increased number of negotiated agreements in BN/SF, UP/SP, CSX/NS/Conrail, and CN/IC.

More specifically, in its landmark 1998 Carmen III decision, the Board held that the authority of arbitrators to override CBAs is limited to that which was exercised by arbitrators giving effect to the WJPA and ICC labor conditions derived from that agreement during the years 1940-1980, a period marked by labor-management peace regarding rail merger implementation. The Carmen III decision was not appealed and is now binding on all arbitrators in addressing CBA override issues.

As to review of labor arbitration awards in general, the Board has strictly interpreted its authority to review these awards consistent with the law, has generally deferred to the expertise of arbitrators, and has declined to review and overturn arbitral awards to the extent possible, regardless of whether the arbitral award favored management or labor. It has, however, where appropriate, used the appeal process to encourage private-sector resolution, sometimes through its decision on appeal or other times by staying arbitration awards to provide time for the parties to negotiate further. Disputes impacted by those stays have been ultimately settled by the parties.

The Board is considering the matter of CBA overrides as part of its reexamination of its major merger rules. Along these lines, the United Transportation Union, the Nation's largest rail union, has negotiated its own agreement with the U.S. rail systems to resolve the CBA override issue. The Board has urged that similar agreements involving other employee groups be negotiated.

Other Rail Matters

I will now mention briefly a few other rail matters that may be of interest to Members of the Committee.

1. Mergers. The application of Canadian National Railway to merge with Wisconsin Central Railroad system is anticipated.

2. Construction Cases. Pending are the application of the Dakota, Minnesota and Eastern Railroad to extend coal-hauling capability by that carrier into the Powder River Basin, and several other rail construction cases geared to produce new competition where the market will support it.

3. Amtrak. Amtrak has asked the Board to become further involved in the proceeding in which the agency acted earlier to facilitate restoration of passenger service between Boston, MA, and Portland, ME.

Non-Rail Matters

Certain issues involving modes other than rail also fall within the Board's jurisdiction. I will briefly describe the Board's jurisdiction and some of the significant pending cases involving other modes.

1. Motor Freight Carriers. Apart from the Board's jurisdiction over motor carrier undercharge matters (a docket that the Board recently closed out), the Board's principal involvement with respect to trucking companies relates to rate bureaus. Under the law, interstate motor carriers may enter into agreements under which competitors may discuss certain matters related to rate setting, and if these "rate bureau" agreements are approved by the Board, then activities conducted pursuant to them are immunized from the antitrust laws. The Board is

reviewing the records compiled to determine the conditions under which the various motor carrier rate bureau agreements could be approved.

2. Intercity Bus Industry. Intercity bus carriers require Board approval for mergers and similar consolidations, and for pooling arrangements between carriers. In recent years, the Board has seen a rise in the number of consolidations within the bus industry. We are watching the bus industry closely in light of the issues that have surfaced in recent months regarding the financial condition of Greyhound and its parent, Laidlaw.

3. Noncontiguous Domestic Trade. Before the ICCTA, the ICC regulated inland water carriage, while regulation of the noncontiguous domestic trade (service between mainland points and points in Alaska, Hawaii, or the U.S. territories and possessions such as Puerto Rico or Guam) was bifurcated: the ICC regulated joint water-motor or water-rail rates, while the Federal Maritime Commission regulated "port to port" transportation. The ICCTA transferred all jurisdiction over noncontiguous domestic trade to the Board, requiring carriers to file tariffs, and giving the Board jurisdiction over the reasonableness of rates for service in the noncontiguous domestic trade. A variety of noncontiguous domestic trade cases are pending at the Board, including a formal rate complaint involving the water carriers serving Guam.

4. Pipeline Rate Regulation. The Board regulates the rates charged for interstate pipeline transportation of commodities other than water, gas, and oil. In October 1996, in a decision responding to a complaint filed against Chevron Pipe Line Company, the Board found that, at certain volume levels, the tariff rates filed by Chevron for the transportation of phosphate slurry from Vernal, Utah, to Rock Springs, Wyoming, were unreasonably high and had to be reduced. In response to a complaint filed against Koch Pipeline Company, the Board recently found that

the rates charged for pipeline movements of anhydrous ammonia from production facilities in southern Louisiana to several Midwestern States were unreasonably high, and it awarded several million dollars in reparations. The Board's decision has been challenged in court.

Conclusion

Since its inception, I believe that the Board has been proactive and constructive in its approach to the matters that have come before it, and has tried to affect in a positive way those issues over which it has direct jurisdictional control. Taken overall, the Board has produced a significant body of decisions, handled its caseload expeditiously, and resolved complex matters before it in an effective and responsible manner in accordance with the ICCTA. The Board has approached its work with fairness, balancing the many varied and often conflicting interests under the statute in reaching its decisions on the record.

I recognize that there are those who believe that the Board has not done enough in certain areas, particularly in the matters of small shipper remedies, labor matters, bottleneck relief, and open access. As I have outlined in my testimony today, and as I stated in my December 12, 1998 letter to this Committee, I believe that the Board has done what it can under its current statutory authority and has moved issues in new and positive directions. Until the law is changed, the Board will continue to implement current law as we believe Congress intended, using its existing authority fully and fairly, in accordance with the goals of common sense government that I have outlined. I look forward to continuing to work with this Committee, other Members of Congress, and all other interested parties as we tackle the many important transportation issues that continue to confront us.